Filed 7/31/02 P. v. Parham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MELVIN PARHAM,** **Defendant and Appellant.**	**A094510** **(Alameda County Super. Ct. No. C137564)**

Melvin Parham (Parham) appeals from a judgment of conviction and sentence imposed after a jury found him guilty of three felony offenses. (Veh. Code, §§ 10851, 2800.3, 20001, subd. (a).) He contends: (1) the court erred in allowing the prosecutor to cross-examine a defense witness with Parham's prior acts of bad conduct; (2) the prosecutor engaged in misconduct when he referred to facts purportedly underlying Parham's prior convictions in his closing argument; (3) the prosecutor engaged in misconduct during closing argument when he referred to unproven hearsay allegations contained in probation and medical reports that had been reviewed but not relied upon by a defense expert; and (4) the cumulative effect of these errors resulted in an unfair trial.

We conclude the foregoing contentions have merit and, because of the severity of the prejudice to appellant, we are compelled to reverse the convictions on count one, unlawful taking of a vehicle with a prior (Veh. Code, § 10851; Pen. Code, § 666.5) and count two, willful flight causing injury (Veh. Code, § 2800.3), as well as the two great bodily injury allegations attending these counts (Pen. Code, § 12022.7, subd. (a)). We

affirm appellant's conviction on count three, failing to stop at the scene of an injury accident. (Veh. Code, § 20001, subd. (a).)

I. FACTS AND PROCEDURAL HISTORY

Parham was charged by information with the unlawful taking of a vehicle with a prior, willful flight causing serious injury, and failing to stop at the scene of an injury accident. Great bodily injury allegations were charged in the first two counts.

The information also contained eight allegations charging prior felony convictions: a 1983 robbery conviction (Pen. Code, § 211) and two 1987 robbery convictions, each of which qualified as a serious felony (Pen. Code, § 667, subd. (a)) and as a strike under the three strikes law (Pen. Code, §§ 667, subds. (e)(2), 1170.12, subd. (c)(2)(A)); a 1992 conviction for unlawful taking of a vehicle (Veh. Code, § 10851) and 1997 conviction for unlawful sexual intercourse with a minor under 16 years of age (Pen. Code, § 261.5, subd. (d)), pursuant to Penal Code section 667.5, subdivision (a); and a 1995 conviction for willful infliction of corporal injury upon a domestic partner (Pen. Code, § 273.5), a 1992 conviction for petty theft with a prior (Pen. Code, §§ 484/666), and a 1981 conviction for burglary (Pen. Code, § 459), for which Parham had been granted probation.

In in limine proceedings, the court granted a prosecution motion allowing impeachment of Parham's testimony by use of the following felony convictions: the 1983 robbery, one of the 1987 robbery convictions, the 1992 unlawful taking of a vehicle, and the 1995 willful infliction of corporal injury conviction. Trial of the prior convictions was bifurcated,[1] and the prosecution was precluded from mentioning Parham's prior felony convictions until such time as he testified.

---

[1] After the jury was impaneled, Parham waived his right to a jury trial on the element of whether he had suffered the prior vehicle theft conviction relative to the charge of vehicle theft with a prior (count one).

A. TRIAL

1. People's Evidence

The events underlying the charges against Parham were not seriously disputed at trial. On September 14, 1999, Jack Suite dropped off his Ford Explorer at Broadway Ford Auto Body in Oakland for body work. He handed the keys to the manager, Dan Coffman, who in turn gave them to his assistant, Danny Lopez. Lopez parked the Explorer across from Coffman's office and left the keys in the vehicle.

About five minutes later, Coffman and Lopez witnessed Parham driving the Explorer out of the body shop onto 25th Street. Coffman instructed Lopez to call 911 and followed the Explorer in his own car. After 15 to 20 minutes, he flagged down a police car driven by Oakland Police Officer William Bergeron at 27th Street and Martin Luther King Jr. Way. Coffman described the Explorer to Bergeron and his partner, Officer Johnny Gutierrez, and advised it was traveling westbound on 27th Street. The officers proceeded westbound on 27th Street and, at the intersection of 27th and West Streets, observed the Explorer traveling north on West Street. The officers gave pursuit. About one car length behind the Explorer, Officer Bergeron activated his patrol car's emergency lights and siren. The Explorer continued to travel at approximately the 25 mile per hour speed limit.

When the Explorer reached the intersection of Brockhurst and Martin Luther King Jr. Way, it slowed down, but then "sped up through the stop sign and then made a left turn onto Martin Luther King." The Explorer proceeded northbound at about 40 miles per hour, pursued by the police car with its lights and siren still activated. As the Explorer approached the intersection of Martin Luther King Jr. Way and 34th Streets in the number one northbound lane, cars in both northbound lanes were stopped, waiting for the red light to change. Without slowing down, the Explorer swerved from the number one northbound lane into the number one southbound lane, entered the intersection against the light, and collided with a Chrysler New Yorker that had entered the intersection traveling eastbound on 34th Streets. Impact to the New Yorker caused it to

spin around before coming to rest against a light standard. The Explorer continued through the intersection, jumped the curb, and crashed into the front of a liquor store.

Parham jumped out of the Explorer and ran, but Gutierrez managed to apprehend him about 20 yards distance from the Explorer. Gutierrez placed him in the rear of the patrol car, where Parham was "belligerent, argumentative, [and] uncooperative." When Bergeron asked Parham his name, he replied, "I ain't saying shit, peckerwood. Fuck you."

The driver of the Chrysler New Yorker suffered multiple rib fractures, two collapsed lungs, blood in the right chest, a skull fracture, and bleeding in the brain.

2. Defense Evidence

Alleging cocaine intoxication and a depression triggered primarily by an argument with his son, Parham claimed that he lacked the required mental states to be guilty of the charged offenses. (See Pen. Code, §§ 22, subd. (b), 26, 28.)

To prove his defense, Parham sought to call family members who would testify that he was not acting like himself when the charged crimes were said to have been committed. Parham categorized this testimony as evidence of his state of mind, as opposed to character evidence. Responding to this offer of proof, the district attorney argued: if the court permitted Parham to present testimony to the effect that an argument with his son had caused him to "snap" the day before the incident, the People were "entitled to question these witnesses if over the past 22-year period of time when the defendant was committing crimes, was he concerned about this relationship with his son and does that impact their testimony as to how they perceived what was going on with this defendant." The trial court permitted the proffered testimony by defense witnesses, but cautioned that such testimony would "open[] the door to character evidence" and give the People "an opportunity to ask some relevant limited questions about [the defense witnesses'] prior knowledge."

The defense then called several witnesses to testify to Parham's state of mind. The first of these, Darin Edwards, testified that Parham had worked for him as a truck driver in June 1999 through August 1999. At the beginning of August, Edwards noticed

a change in Parham's performance. Later that month, he discussed the matter with Parham. Parham "seemed pretty distraught, shaken up about an incident that happened at home. He had tears in his eyes when he was talking . . . ." "Obviously," Edwards offered, "something happened at home that was effecting him at work."

Dr. John Podboy, a clinical and forensic psychologist, evaluated Parham at the request of Parham's attorney for about two and one-half hours, read the police reports for this case, reviewed extensive records from Parham's California Department of Corrections file, the Oakland police, and mental health services, and spoke with Parham's mother. Parham told Dr. Podboy of his significant crack cocaine use near the time of the September 14 incident. His body weight had decreased substantially due to his crack cocaine use, he was hardly sleeping at all, and he used so much crack that his tongue was burned and split and he could not eat. Parham also said he was experiencing suicidal feelings at the time, and that a major source of his depression was an argument he had had with his son. Dr. Podboy opined that Parham had a conduct disorder of anti-social personality, was a poly-substance abuser, suffered from clinical depression, had at times been suicidal, and was chronically depressed in a "very serious sense for major portions of his life."

Dr. John Dupre, a forensic psychiatrist at San Quentin, examined Parham in September 1999 and concluded Parham was capable of assisting his attorney, but his significant depression decreased his willingness to provide any assistance. Dr. Dupre diagnosed Parham as suffering from "cocaine induced mood disorder."

Deborah Botley was the principal defense witness to testify about the change in Parham's demeanor. She had known Parham for about 23 years, and they had three sons together, including Melvin Parham, Jr. (Melvin, Jr.). The day before the incident, Parham spoke to her about a problem in his relationship with Melvin, Jr. At that time, Botley noticed, Parham was "stressed out," "hollering," angry, crying, and in this way not acting like himself. Botley explained, "He wasn't his self. . . . He wasn't acting like he used to normally act. I noticed how the way he was talking. He wasn't talking like he was in his right state of mind."

The next day, Botley testified, her husband saw Parham being pursued by a police vehicle. Botley walked to the area of 32nd Street and Martin Luther King Jr. Way and spotted Parham in the back seat of a police car. Parham "was in tears and he was shouting and he was asking me was the guy -- the guy was okay that was in the car, the car he ran into . . . . He was asking about the guy, asking me to see [if he was] all right." Parham also said he wanted to die. Botley had seen Parham use cocaine to excess in the past, and she believed he was under the influence of cocaine when she spoke to him on the occasion of his arrest on September 14.

In response to the prosecutor's questions on cross-examination, Botley expressed her belief that Parham had tried to be a good father. The prosecutor then prefaced his line of questioning with the comment: "Given that [the defendant] tries to be a good father and he's concerned about his son and because of this he wasn't acting himself, let me ask you a few questions here." Botley was asked, "[i]n March of 1996, was the defendant acting himself when he was arrested for unlawful sexual intercourse with a 12-year-old girl?" Defense counsel objected. The prosecution asserted the court had already ruled on the matter in limine. The trial court apparently agreed, and the objection was overruled. After Botley responded that she did not know how to answer the question, the prosecutor asked about Parham's relationship with his son "when he pled guilty to that offense in January of 1997." Defense counsel objected, and an unreported conference took place in chambers, which the parties and court neglected to memorialize on the record. We gather, however, from the remaining examination and counsels' comments later at trial that the court permitted the prosecutor to examine Botley as to Parham's prior acts of wrongdoing, as well as the facts underlying those acts.

Immediately following the conference, the prosecutor asked Botley if she was aware that Parham had pled guilty to the offense of unlawful sexual intercourse in 1997. When Botley responded in the negative, he next inquired: "If he had, would that change your opinion about whether or not he's been a good father" or "not acting himself" in September 1999. Botley answered it would not.

The district attorney proceeded to examine Botley in a similar fashion as to Parham's purported arrest in 1996 for "hit and run," a 1995 arrest for assaulting his girlfriend, his 1992 conviction for vehicle theft, 1987 arrests for robbery and bank robbery, and a 1983 robbery arrest. Botley said she was unaware of these incidents. In any event, Botley testified, these events would not change her opinion as to whether Parham was "acting himself in September of 1999." Questioning of Botley was not limited to the mere fact of Parham's past convictions and arrests. Instead, the district attorney alluded to the apparent facts upon which the arrests or convictions were based. For example, the prosecutor asked: "in January of 1995, the defendant was arrested for pulling another girlfriend out of a car, punching her, kicking her and striking her in the back of the head requiring staples to close the wound in her head. Were you aware of that." On other occasions, he asked Botley if she was aware that Parham was "arrested [in 1992] for felony auto theft while driving a stolen car and evading police while crashing into a parked Oldsmobile," arrested in 1987 "for a robbery after choking a woman and then taking her purse" and arrested in February 1983 for "using a shotgun to rob a woman getting out of her car at a BART station here in Oakland." No evidence of the facts underlying any of these incidents was ever presented at trial.

Parham moved for a mistrial, on the ground the prosecutor had improperly placed before the jury facts purportedly underlying Parham's prior convictions. His motion was denied.

After Botley's examination, Parham testified. He acknowledged felony convictions for 1983 and 1987 robberies, 1992 unlawful taking of a vehicle, and 1997 unlawful sexual intercourse. Parham then described his state of mind around the time of the current offenses, explaining that a woman with whom he was involved (Peppy) was "deceitful" toward him. As a result, he became depressed and started again using cocaine. When his son Melvin, Jr., suspected the relapse, he and Melvin, Jr., argued. In August 1999, his son told him to get away, threw $60 at him, and said, "Here, go smoke some crack." At that point, Parham felt "very, very low" and believed he "had reached

bottom." By the last week of August or the first week of September, Parham "ended up at a motel with about $1300 and that was the last my family seen of me."

The day before his arrest on the present charges, Parham visited Botley, advising her of his argument with Melvin, Jr. When he left Botley's house, Parham smoked crack cocaine, eventually ran out of money, and then exchanged his car for more crack cocaine. He wandered around town and smoked crack throughout the night of September 13 and into the morning of September 14.

Parham claimed to remember little of the events of September 14. He recalled getting into the Explorer to lie down. The next thing he could clearly remember was sitting in the back seat of the patrol car. Parham did not recall hearing any sirens or seeing any red or blue flashing lights as he drove. While sitting in the back of the patrol car, he had started to cry, and continued to be distraught after his transport to the Oakland Police Department. Parham denied taking the Explorer with the intent of not returning it, claimed he did not realize he was being followed by the police, and denied intending to evade them.

3. Rebuttal Evidence

Sergeant Derwin Longmire of the Oakland Police Department interviewed Parham at the police station on the evening of September 14, 1999. During the half hour the two spent together, Parham "was somewhat arrogant, elusive, [and] didn't really answer questions very well." Longmire never noticed Parham to cry during the interview. Nor did he appear overly distraught.

4. Closing Argument and Motion for Mistrial

During the rebuttal portion of his closing argument, the district attorney referred to Parham's prior convictions and arrests, and the facts purportedly underlying them, challenging Botley's credibility insofar as she testified that knowledge of those prior incidents would not change her view of Parham. The prosecutor then asserted: "I submit to you the reason these events didn't change her opinion that the defendant was not acting himself was that in September of 1999 *he was acting in perfect conformity with exactly who and what he is*." (Italics added.) The prosecutor also challenged Dr. Podboy's

opinions and the veracity of Parham's testimony, citing to excerpts from Parham's 1992 probation report and 1995 medical report which Dr. Podboy had reviewed.

After the closing arguments, Parham again moved for a mistrial, charging that the prosecutor improperly referred to "matters outside the evidence in the form of the specific facts related to priors that were admitted and reference to . . . facts outside the record with respect to medical records reviewed by Dr. Podboy, but not relied upon," as well as "a probation report that was not part of the record relied upon in Dr. Podboy forming his opinion." This motion for mistrial was also denied.

B. VERDICT AND SENTENCE

The jury found Parham guilty of the three offenses charged in the information. It also found true allegations that Parham had personally inflicted great bodily injury in committing the crimes in counts one and two.

As to count one (unlawful taking of a vehicle with a prior), the court sentenced Parham to 25 years to life in state prison in accordance with the three strikes law, three years in state prison for one of the two great bodily injury enhancements (Pen. Code, § 12022.7, subd. (a)), plus five years in state prison for each of the three prior serious felony convictions (Pen. Code, § 667, subd. (a)), for a total term on count one of 43 years to life in state prison. As to each of counts two and three, the court imposed concurrent terms of 25 years to life, but stayed each of these sentences pursuant to Penal Code section 654.[2]

This appeal followed.

II. DISCUSSION

As we set forth, *ante*, Parham maintains: (1) the court erred in permitting the prosecution to cross-examine Botley with his prior bad acts, (2) the prosecutor

---

[2] On its own motion, the court struck the great bodily injury enhancement associated with count two as well as Parham's 1992 vehicle theft conviction, 1997 unlawful sexual intercourse conviction, and 1995 willful infliction of corporal injury conviction. On motion of the People, the court struck his 1992 conviction of petty theft with a prior and 1981 conviction of burglary.

improperly argued the unproven facts purportedly underlying Parham's prior convictions and arrests, and (3) the prosecutor improperly argued unproven hearsay entries contained in reports reviewed by Dr. Podboy. We consider the first two contentions together, and conclude it was reversible error for the court to admit and for the district attorney to argue Parham's prior bad acts in the guise of rebuttal character evidence. We also find error in the prosecutor's argument to the jury that a hearsay entry in a medical report might be considered to impeach Parham's trial testimony.

A. CROSS-EXAMINATION OF BOTLEY WITH PARHAM'S PRIOR BAD ACTS

We begin with the fundamental principle that the People are prohibited from introducing evidence of a defendant's bad character, including evidence of the defendant's prior convictions or other wrongful conduct, in order to prove he acted in conformity with that character on the occasion of the current charges. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; Evid. Code, § 1101, subd. (a).) The People argue that inquiries concerning Parham's prior bad acts were permissible, because Parham first introduced evidence of his good character when Botley testified that he was not acting like himself. The People claim cross-examination of Botley was therefore authorized under Evidence Code section 1102.

Evidence Code section 1102 allows in criminal cases "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation," if it is (a) "[o]ffered by the defendant to prove his conduct in conformity with such character or trait of character" or (b) "[o]ffered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." Under Evidence Code section 1102, the prosecution may present opinion or reputation evidence of the defendant's bad character only if the defendant first presented opinion or reputation evidence of his good character, in order to prove he acted in conformity with that character trait.

The questions we must first address are (1) whether Botley's testimony was evidence of good character within the meaning of Evidence Code section 1102, and (2) whether evidence of Parham's prior convictions and their underlying facts was the type

of evidence the People could use in rebutting Botley's purported character evidence. The answer to each question is in the negative.

As to the first inquiry, we find that Botley did not present character evidence within the meaning of Evidence Code section 1102. Character evidence is evidence of the defendant's propensity or disposition to engage (or not to engage) in a certain type of conduct. By contrast, Botley testified to Parham's *demeanor* shortly before the incident: "Q. At some point in time during August, September of 1999, did you become aware of a problem between Melvin Junior and Melvin Senior? [¶] A. Yes. [¶] Q. And at some point did you have occasion to speak with Melvin Senior about that? [¶] A. Yes. [¶] Q. And when you were speaking with Melvin Senior about that particular situation, what was Melvin Senior's *demeanor*? [¶] A. He was stressed out about it. [¶] Q. Okay. What was [it] you observed that led you to that conclusion that he was stressed out? How was he acting? [¶] A. He was hollering and he wasn't acting hisself [*sic*]. He was hollering, he was angry. [¶] Q. Did he cry? [¶] A. Yes. [¶] Q. And when you say he wasn't acting his self, how was his conduct different at that time from when he normally acted like? [¶] A. He normally come and talk to me about the kids in a situation, the problems that they're having. But at that particular time, talking to him that day about Melvin, he was shouting, he was upset about the things that they was arguing about and he started hollering at me about it. Yeah, so that's a change I noticed." The examination continued: "Q. [] Now over the 23 or so years that you'd known Melvin Senior, you made observations about his *appearance and demeanor* in all kinds of situations? [¶] A. I don't understand what you mean. [¶] Q. Well, you seen how Melvin Senior acted when he was happy? [¶] A. Yes. [¶] Q. You seen how Melvin Senior acted when he was sad? [¶] A. Yes. [¶] Q. You seen how he acted when he was concerned? [¶] A. Yes. [¶] Q. You seen him act in a manner that led you to conclude that he was depressed? [¶] A. Yes. [¶] Q. And in making those observations, what sort of the things did Melvin Senior do when he was acting depressed in your mind? [¶] A. He wasn't his self. I noticed that when he first appeared to me. I noticed he wasn't his self. He wasn't acting like he used to normally act. I noticed how the way he was talking. He wasn't talking like he was in

his right state of mind." (Italics added.) Botley further testified that Parham appeared to be under the influence of cocaine on the day of the incident.

Botley's testimony was offered as anecdotal evidence of Parham's state of mind at the time of the offenses. It was not offered to show that he was a good person, law-abiding, honest, or otherwise indisposed to take the Explorer, evade the police, or flee the scene of the accident, but that at the time of the offenses he lacked the requisite mental state relative to the charged offenses.

The Attorney General first points out an excerpt of Botley's testimony on *cross-examination,* as character evidence that the witness believed Parham was attempting to be a good father and was concerned how his son viewed him.[3] Even if considered character evidence, this testimony was not offered by the *defense*, such that it would trigger the prosecution's right to introduce rebuttal evidence as to Parham's character. Moreover, Botley put forth her view of Parham's relationship with his son to explain why Parham was upset at the disruption of that relationship, rather than to

---

[3] The prosecutor recast Botley's direct testimony as follows: "Q. Now you mentioned that apparently the defendant had some sort of an argument or some sort of incident with his son that hurt the defendant? [¶] A. Yes. [¶] Q. And [it's] fair to say that in the time that the defendant -- that you've known the defendant, that he's concerned about how his son feels about himself? [¶] A. Yes. [¶] Q. Tries to be a good father? [¶] A. Yes. [¶] Q. And that's, I take it, the case with Melvin Junior. He tries to be a good dad to Melvin Junior? [¶] A. Yes. [¶] Q. All right. You mentioned on September 14th or about that period of time the defendant wasn't acting himself? [¶] A. No. [¶] Q. Because normally he's concerned about his children and you felt he wasn't acting in a way that showed concern for his kids? [¶] A. No, it wasn't that kind of way. It didn't happen in like that kind of way. I noticed that the change from like a couple of months before when he came to my mom house and the conversation him and his son was having, the relationship they was having until say back to September 14, around that time it was totally different. [¶] Q. Okay. By different, he was then behaving how he doesn't normally act; is that right? [¶] A. Right. [¶] Q. Not acting what you would call normally? [¶] A. It's all because of the argument that they had that I seen the change. [¶] Q. *Given that he tries to be a good father and he's concerned about his son and because of this he wasn't acting himself, let me ask you a few questions here*." The prosecutor then inquired about the incidents underlying Parham's numerous convictions and arrests.

suggest he was not the type of person who would steal an automobile and flee from the police. At bottom, Botley did not offer opinion or reputation evidence of Parham's good character, which would entitle the prosecution to introduce evidence of Parham's bad character.

As to the second question, namely, whether evidence of Parham's prior convictions and their underlying facts was the type of evidence the People could use in rebutting Botley's purported character evidence, the fact of Parham's prior convictions and arrests could not be introduced under Evidence Code section 1102, subdivision (b), even if her testimony had been exculpatory character evidence. Evidence Code section 1102, subdivision (b), entitles the prosecution to introduce character evidence in the form of opinion or reputation testimony, not specific conduct such as prior convictions, arrests, or the facts underlying either. (*People v. Wagner* (1975) 13 Cal.3d 612, 617-619 (*Wagner*).)

However, a defense witness *may* be cross-examined as to specific acts of the defendant, where the witness has testified to the defendant's good character, and the prosecutor seeks to challenge her knowledge of the defendant or the credibility of her opinion. Under this approach, questions raising specific acts of conduct—including prior convictions reflecting such conduct—are permissible, not to elicit rebuttal evidence under Evidence Code section 1102, subdivision (b), but to test the quality of the witness's character testimony. (*Wagner, supra,* 13 Cal.3d at p. 619 ["The rationale allowing the prosecution to ask such questions (in a 'have you heard' form) is that they test the witness' knowledge of the defendant's reputation."].) Thus, witnesses who provide reputation or opinion evidence for the defense may be cross-examined as to whether they have heard of conduct by the defendant that is inconsistent with the witness's testimony, as long as the prosecutor has a good faith belief the conduct took place. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.)[4]

---

[4] This helps explain the ruling in *People v. Lankford* (1989) 210 Cal.App.3d 227, 240, on which the People rely. There, the defendant on direct examination admitted a

Nevertheless, the district attorney's questioning of Botley cannot be justified on this basis either, since Parham's prior convictions and arrests were not *inconsistent* with Botley's testimony. Botley testified Parham was not himself because he was hollering, angry, and depressed about the argument with his son. But, the specific instances of conduct introduced by the prosecution did not tend to show that he was, in fact, "himself"—that he hollered and was angry *before* the period surrounding the September 14 offenses as well. Conversely, Parham's prior convictions for robbery, vehicle theft, unlawful sexual intercourse, and beating his girlfriend were irrelevant, because Botley had not testified as to her opinion of Parham or his reputation with respect to honesty, sexual proclivity, or propensity to violence.[5]

The trial court erred in permitting the prosecution to cross-examine Botley with Parham's prior bad acts, including the purported underlying facts.

1. Prejudicial Error

Parham asserts the errors denied him due process of law and were not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) Alternatively, he asserts it was reasonably probable that but for the errors he would have obtained a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Because the court's errors are not of constitutional magnitude, the *Watson*

---

prior felony conviction and then volunteered: "I didn't have no incidents yet since I've been out." (*Id.* at p. 232, italics omitted.) The court held that this comment as to his law-abiding nature constituted character evidence under Evidence Code section 1102, and permitted prosecution rebuttal under Evidence Code section 1102, subdivision (b). The court permitted impeachment with specific acts under Evidence Code section 787 "*on the issue of his credibility*, even though such evidence *also* related to appellant's prior conduct that rebutted evidence of his recent good moral character." (*Lankford*, *supra*, at p. 240, italics added.)

5 Under Evidence Code section 1101, subdivision (b), evidence of the defendant's prior bad acts may be admitted to prove his intent or some other material fact besides his propensity to commit a similar act. The People do not contend that the prosecutor's inquiries of Botley could be justified on this basis, and Botley's denial of any knowledge of Parham's prior convictions and arrests would have precluded further inquiry on this topic in any event.

standard applies. (See *Wagner*, *supra*, 13 Cal.3d at p. 620 [applying *Watson* standard where prosecutor exceeded proper scope of impeachment by cross-examining on specific acts].)[6] Under either standard, we would reach the same result: the combination of the court's error in allowing the line of questioning, and the prosecutor's use of this examination in closing argument, was sufficiently prejudicial that the verdicts cannot stand as to the first two counts.

We recognize, even in the absence of the district attorney's cross-examination of Botley, the jury still would have learned of a number of Parham's prior felony convictions. The court ruled, and Parham does not dispute, that he could be impeached with his 1983 robbery conviction, *one* of his 1987 robbery convictions, his 1992 unlawful taking of a vehicle, and his 1995 willful infliction of corporal injury conviction. In fact, Parham admitted on direct examination felony convictions of robbery (1983 and 1987), unlawful taking of a vehicle (1992), and unlawful sexual intercourse (1997). There is no indication Parham admitted these convictions solely because the prosecutor had earlier referred to them in his cross-examination of Botley. We are also aware that one of Parham's own witnesses, Dr. Podboy, mentioned Parham's problems with the criminal justice system, which began when he was a juvenile and continued into his adult years. In particular, Dr. Podboy indicated that Parham has a "lengthy rap sheet" and had undergone "prolonged periods of incarceration." Even so, we find that a partial reversal is required.

First, in addition to the arrests and convictions mentioned in part II.A. of this opinion, Botley was also confronted with Parham's apparent 1996 arrest for a related crime, "hit and run." The court had not earlier ruled that Parham could be impeached by

---

[6] Parham relies on *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 (*Gaines*), to argue that the *Chapman* standard should apply. In *Gaines*, the prosecutor argued to the jury what he thought an absent witness *would have* testified to, thus depriving the defendant his Sixth Amendment right to confrontation and cross-examination. Here, by contrast, the prosecutor's questions and argument to the jury referred to underlying facts of the defendant's arrests and convictions which were raised, but not admitted, at trial.

use of this particular incident, Parham did not admit it occurred, and no evidence of any such arrest was ever received.

Second, the prosecutor did not merely ask whether Botley was familiar with the various convictions or underlying arrests, but described them by setting out their apparent underlying facts in inflammatory terms. For example, his questions contained reference to Parham having sexual intercourse with a "12-year-old girl," pulling a "girlfriend out of a car, punching her, kicking her and striking her in the back of the head requiring staples to close the wound in her head," "driving a stolen car and evading police while crashing into a parked Oldsmobile," "choking a woman and then taking her purse," and "using a shotgun to rob a woman getting out of her car at a BART station here in Oakland."

Third, prejudice from this line of examination was exacerbated by repeated reference to Parham's prior convictions, arrests, and their underlying facts in closing argument. In part, the prosecutor explained that these matters were raised to attack Botley's credibility, since she claimed not to know of them and would not alter her opinion even if she had. Then jurors were told: "I submit to you the reason these events didn't change her opinion that the defendant was not acting himself was that in September of 1999 *he was acting in perfect conformity with exactly who and what he is*." (Italics added.) By this, the prosecutor not only implied that the inflammatory events had in fact occurred—without any evidence in the record—but he exhorted the jury to use this information as proof that Parham acted in a similar manner on September 14.[7] The argument, in effect, not only urged the jury to disbelieve the testimony of Parham's primary percipient witness as to his demeanor and state of mind on September 14, but also to believe that Parham was predisposed to committing the very crimes of vehicle theft and evading the police with which he was charged.[8]

---

[7] The court instructed the jury: "The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. . . ." (See CALJIC No. 2.23.)

[8] Defense counsel did not object during the prosecutor's argument. After closing arguments, however, counsel moved for a mistrial on the ground the prosecutor had

The district attorney also used Parham's prior felony convictions as evidence of bad character, suggesting Parham was not concerned about his son when committing these crimes: "What is particularly offensive is the defendant's claim for a new-found concern about how his son views him. Ask yourself these questions when you deliberate and when you evaluate the defendant's version of things and why he claims he acted in the way he did. [¶] Where was the defendant's concern for Melvin Junior in 1983? In 1983 Melvin Junior would have been five, six years old. Where was the defendant? Out committing robberies. [¶] How about the defendant's concern for his son in 1992, where was that? At that point his son would have been 13, 14 years old, entering those awkward teenage years. Where was the defendant? Getting convicted for being out stealing cars. [¶] Where was his concern in 1995? His son would be 16, 17 years old entering adolescence. Where was the defendant? Getting convicted for beating up his girlfriend. [¶] Where was the concern in 1997, when his 19-year old son was entering early adulthood and the defendant was copping a plea with having sex with somebody younger than his son. Where was the concern, dad? Where was it? It's here now. Anybody find that to be a little bit of a coincidence?" Essentially, this argument urged the jurors to accept that Parham was not really depressed on September 14 out of concern for his son, because his criminal history suggested the contrary. There was simply no evidentiary basis for this prejudicial argument.

Fourth, the court's instructions to the jury failed to mitigate the prejudice to Parham's case. The instructions on character evidence (CALJIC Nos. 2.40 & 2.42) could only have confused the jury, since the court never identified the evidence to which these instructions applied and failed to give any limiting or advisory instruction when the testimony was first received. To the extent the instructions were understood, they

---

improperly referred to "matters outside the evidence in the form of the specific facts related to priors that were admitted." (See *People v. Bolton* (1979) 23 Cal.3d 208, 211-213 [improper for prosecutor to refer to matters during closing argument that are not in evidence] (*Bolton*).) In light of our holding, we need not consider whether the trial court abused its discretion on this separate ground.

authorized the jury to consider character evidence for an improper purpose. In particular, the jury was instructed, "Where on cross-examination, a witness is asked if he [or] she has heard of reports of certain conduct of a defendant inconsistent with the traits of good character to which the witness has testified, *these questions and the witness's answers* to them may be considered *only for the purpose of determining the weight to be given to the opinion of the witness or to his [or] her testimony as to the good character of the defendant*. [¶] These questions and answers are not evidence that the reports are true and you must not assume from them that the defendant did in fact conduct himself inconsistently with those traits of character." (CALJIC No. 2.42.) (Italics added.) As urged by the district attorney, this instruction told jurors they might use Parham's prior convictions and arrests to discount "the weight to be given to the opinion of [Botley]." As the key defense witness to Parham's purported change in demeanor and cocaine intoxication on the date of these incidents, Botley's testimony was crucial to his "diminished actuality" defense. The court's instructions of law buttressed the prosecutor's improper impeachment of this defense witness.

We recognize that Parham's defense, which focused on his state of mind, is not particularly compelling. Nevertheless, evidence as to his state of mind was not so overwhelming to permit us to conclude that the jury would have reached the same verdicts as to counts one and two in the absence of error. To establish the requisite mental state for a conviction under count one, unlawful taking of a vehicle (Veh. Code, § 10851), it must be established that Parham had the specific intent to deprive the owner, permanently or temporarily, of his title to or possession of the vehicle. As to count two, willful flight causing serious injury (Veh. Code, § 2800.1, 2800.3), the prosecution must prove that Parham had the specific intent to evade the police. Evidence of Parham's state of mind, favorable to the prosecution, included the officers' testimony that Parham sped up, entered an intersection against a red light, and impacted the Chrysler automobile after the emergency lights and siren had been activated on the patrol car. Parham then fled from the Explorer, but was apprehended about 20 yards away. Further, the officers testified, Parham was belligerent at the accident scene and did not appear overly

distraught later that day. These actions might certainly cause one to conclude that Parham intended to steal the Explorer and evade the authorities. Given evidence of Parham's recent depression and poly-substance abuse, however, a different conclusion cannot be dismissed.

Other evidence in the record allows for the inference that Parham lacked the *mens rea* required in counts one and two. (Pen. Code, §§ 22, subds. (b), (c), 29, subd. (a); see CALJIC No. 4.21.1.) When the emergency lights and siren of the patrol car were initially activated, Parham continued driving at the speed limit for some time, without evasive action. Parham denied any intent to steal the vehicle or awareness he was being pursued by the police, explaining he had been on an all-night, depression-induced, cocaine binge beginning the day before the accident. Botley confirmed Parham had been distraught the day before the accident and appeared intoxicated on the day of the accident. Further, Dr. Podboy opined Parham suffered from clinical depression and poly-substance abuse, and Dr. Dupre diagnosed him as suffering from "cocaine induced mood disorder." The foregoing constitutes substantial evidence supporting appellant's theory of defense.

Thus, we conclude that the admission and use of Parham's prior convictions, arrests, and bad acts, together the court's instructions of law, deprived Parham of the jury determination of the defense to which he was entitled as to the first two counts.

On the other hand, specific intent is not an essential element of the crime charged in count three, failing to stop at the scene of an injury accident (Veh. Code, § 20001, subd. (a)). Consequently, Parham's purported voluntary intoxication and mental disorder (i.e., his diminished actuality defense) would not relieve him of responsibility for this crime. To establish guilt, the district attorney had to prove that the defendant knew an accident occurred, knew of his involvement, knew a person was injured or that such injury was probable from the nature of the accident, and willfully failed to stop, give required information, and render reasonable assistance to the injured person. Although Parham testified he was unaware of his involvement in the collision until informed by others at the scene, the record belies this testimony. Immediately after the car he was driving collided with the Chrysler in the intersection, Parham exited the Ford Explorer,

attempted to flee, and was chased down and apprehended by an officer at the scene. On this record, neither his purportedly depressed state of mind or voluntary intoxication could exculpate Parham from the jury's finding of guilt as to this general intent crime. (Pen. Code, §§ 22, 29.)

B. PROSECUTOR'S REFERENCES TO UNPROVEN HEARSAY ALLEGATIONS IN REPORTS

After closing arguments, Parham moved for a mistrial on the ground the prosecutor committed prejudicial misconduct in his rebuttal argument. Parham claimed the district attorney (1) improperly referred to the facts underlying his prior convictions, and (2) improperly argued as fact unproved hearsay entries from probation and medical reports, which were reviewed but not relied upon by defense expert Podboy. (See *Bolton, supra,* 23 Cal.3d at p. 215.) We have already addressed the prosecutor's improper argument in which he relied upon purported facts underlying Parham's prior convictions and arrests. We now examine the prosecutor's use of entries from probation and medical reports.

On cross-examination, Dr. Podboy opined that Parham was not malingering when he claimed to be depressed, but conceded his diagnoses would be jeopardized if Parham had lied to him. Podboy then acknowledged reviewing a 1992 probation report, in which the probation officer had suggested Parham's apparent desire for drug treatment was merely a ruse to avoid imprisonment: "Q. [] Now you also mentioned that you reviewed the defendant's probation reports; is that correct? [¶] A. Some, I don't know about all of them. [¶] Q. Did you review his probation report from 1992? [¶] A. I may have. If you want to show it to me I could tell if you [*sic*] I read it. [¶] . . . [¶] Q. [] Let me show you what's been marked as People's 25 for identification. For the record, I'll show this to defense counsel. It's a 15-page document. [¶] Showing you People's 25, Doctor. Did you review that 1992 probation report? [¶] A. I remember the social factors and the speculation that it was a roos [*sic*] for him to want drug treatment. I recognize the unusual name of the Deputy Probation Officer Pankopf. . . . [¶] Q. In that report, does Mr. Pankopf note that it would not be an unwarranted inference to conclude his new

found desire for drug treatment is nothing more than a roos [*sic*] to avoid imprisonment? [¶] A. That's what he wrote."

Dr. Podboy also acknowledged reviewing a 1995 medical report, which recorded Parham's statement to a doctor to the effect that a jury might sympathize with him if he was working and suffered a deceitful relationship: "Q. Finally, Doctor, I'm going to show you what's marked as People's 26 for identification. [¶] Showing you People's 26 for identification, Doctor, do you recognize that as a March 14th of 1995 follow-up visit for Mr. Parham with Alameda County? [¶] A. I think I remember this because it had to do with a relationship that went awry. [¶] Q. In speaking of that relationship, did Mr. Parham not tell Dr. Barret that he believes a jury might sympathize with all his work and the frustration of a deceitful relationship? [¶] A. Words to that effect, I'm sure." Parham did not voice objection to the foregoing examination.

In closing argument, the district attorney referred to excerpts from the 1992 and 1995 reports. He challenged Podboy's opinion that Parham was not malingering, citing the 1992 probation report in which "the probation officer wrote it would not be an unwarranted inference to conclude his new found desire for drug treatment is nothing more than a roos [*sic*] to avoid imprisonment."[9] He then challenged *Parham's* testimony that, despite gainful employment, his deceitful relationship with Peppy had caused him to return to drugs. Relying on the 1995 medical report, he suggested Parham's testimony in

---

9 The prosecutor argued: "Finally, with respect to Dr. Podboy we talked about the concept of malingering. Malingering involves a criminal defendant exaggerating symptoms when there's an external motivation or reason to do so. One of those external motivations that malingering talks about is to evade or elude criminal prosecution. The DSM tells us we should strongly suspect malingering if you have, for example, somebody with an antisocial personality disorder who has a psychologist referred to by their own attorney. Not Dr. Podboy, ruled it out of hand. No evidence of malingering despite some of the things in his medical records, including a 1992 probation report which the probation officer wrote it would not be an unwarranted inference to conclude his new found desire for drug treatment is nothing more than a roos [*sic*] to avoid imprisonment. Again, the alarm bells should be going off with respect to the testimony of Dr. Podboy and his credibility in this courtroom."

this regard was contrived: "But a new standard for shamelessness presented itself when the defendant himself took the stand in his own behalf. For their case to hold any weight at all, for him to walk out of this courtroom, you are going to have to believe his testimony about what happened on September 14th, of 1999. If you don't, the only result we can have is a guilty verdict. That is inescapable. Let's look at the defendant's version of events. [¶] You'll recall that shortly before this he was dating a woman by the name of Peppy. That relationship, in the defendant's words, became deceitful. Because of that, he began to return to drugs, a little at first but more after a while. That's really too bad that he suffered from this deceitful relationship because at that point he was a hard-working guy. You learned about his job at Sleep Train. So he has a deceitful relationship, he's working hard. Is this starting to sound familiar to anybody? Does it sound like something we heard about way back in 1995 when he told his examiner that he believes a jury might sympathize with his hard work and a deceitful relationship? This is turning into Groundhog Day. It's the same thing over and over and over again."

In light of the district attorney's closing argument, Parham claims: (1) Dr. Podboy never testified that he *relied* on either of the reports, which were inadmissible hearsay, in forming any of his opinions regarding Parham's mental state or his diagnosis (Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618 (*Gardeley*); *People v. McFarland* (2000) 78 Cal.App.4th 489, 495); (2) because the 1992 and 1995 reports were inadmissible hearsay, the prosecution committed misconduct in arguing their contents for the substantive truth (*Bolton, supra,* 23 Cal. 3d at p. 215); and (3) no limiting instruction was given which would have informed the jury that hearsay relied upon by an expert cannot be considered for its truth.

Parham's first claim is without merit. Whether Dr. Podboy relied on the reports is germane to whether he could testify to their contents. (Evid. Code, § 801, subd. (b); *Gardeley, supra,* 14 Cal.4th at p. 618.) Because Parham made no timely objection to the prosecutor's cross-examination of this expert witness, this issue is waived. (Evid. Code, § 353; *People v. Coleman* (1988) 46 Cal.3d 749, 777.)

Nor are we persuaded by Parham's third claim. Although the court initially indicated it would not give CALJIC No. 2.09, pertaining to the use of evidence admitted for a limited purpose, the instruction was ultimately given: "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted." This limiting instruction might have proved more helpful *if* Parham had sought a ruling identifying the particular evidence that was admitted for a limited purpose (i.e., excerpts from the 1992 and 1995 reports). He did not do so. Nor did he request any form of limiting instruction addressing the proper use of hearsay relied upon by expert witnesses. Without this request, the court had no duty to give any such instruction. (See *People v. Simms* (1970) 10 Cal.App.3d 299, 311.)

We turn then to Parham's claim that the district attorney improperly argued excerpts from the 1992 and 1995 reports as substantive evidence. The prosecutor referred to the 1992 report to attack Dr. Podboy's opinion that Parham was not malingering in his claims of depression. In challenging this opinion, the prosecutor did not indicate that entries from the *1992 report* were necessarily true. Rather, the district attorney referred to an entry that had been read during Dr. Podboy's cross-examination, to buttress his argument that the witnesses' credibility should be given less weight since he failed to consider a particular entry that facially conflicted with his diagnosis. We find no misconduct in the prosecutor's revisiting this portion of his cross-examination of the defense expert.

The prosecutor's use of the examiner's statement in the *1995 medical report*, that Parham previously expressed the belief that a deceitful relationship might enamor him to a jury, was admissible in cross-examining Dr. Podboy for the same reason—it tended to undermine his diagnosis. In other words, the prosecutor did not use the hearsay entry for its truth (that Parham *had* told the examiner of this ploy), but rather to demonstrate that Dr. Podboy's conclusion was not credible in light of the material he reviewed and his staunch acceptance of Parham's claims as true.

In closing argument, the district attorney's tactic changed. There he used the excerpt from the 1995 report to discredit *Parham's* trial testimony—specifically his claim that despite his gainful employment, his deceitful relationship with Peppy had caused him to turn to drugs. The entries recorded in the 1995 report would have relevance to Parham's credibility only if they were admitted as affirmative evidence that Parham had in fact told the examiner of this ploy. Because the 1995 report was brought up in a limited context, to demonstrate that Dr. Podboy's conclusions were unreliable, it was improper for the district attorney to then argue the report for its truth to discredit Parham's testimony.

A motion for mistrial should be granted when the error and incurable prejudice deprives the defendant of a fair trial. (See *People v. Woodberry* (1970) 10 Cal.App.3d 695, 708; *People v. Slocum* (1975) 52 Cal.App.3d 867, 884.) As to counts one and two, we need not rule whether it was error to deny Parham's motion for mistrial on this ground, because we have previously determined the convictions on these two counts must be reversed. The improper use of the 1995 medical report only contributes to the prejudice we identify in part II.A., and buttresses our conclusion that reversal is required as to appellant's convictions of unlawful taking of a vehicle (count one) and willful flight causing injury (count two).

The prosecution's misuse of the 1995 report in closing argument tended to undermine Parham's testimony to the effect that a deceitful relationship had precipitated his return to the use of cocaine—i.e. why he started using drugs again. However, *why* Parham returned to drugs was not particularly material to his defense, which focused upon his mental state on the day of the offenses. Given the rather overwhelming evidence of guilt, as discussed *ante*, we do not view the district attorney's reliance upon hearsay entries from the 1995 medical report to discredit appellant's testimony on this tangential subject unduly prejudicial. Even when considered in combination with the errors we have identified surrounding the testimony of defense witness Botley, we conclude that there is no reversible error as to count three.

III. DISPOSITION

The judgment is reversed as to the convictions returned on counts one and two, together with the findings of great bodily injury. The judgment and verdict as to count three is affirmed. The matter is remanded to the trial court with instructions to prepare a modified abstract of judgment in accordance with this opinion, and to forward a copy of the modified abstract of judgment to the Department of Corrections.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.